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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MARK A. ARTHUR, et al.,
11 Plaintiffs,
12 v.
13 SALLIE MAE, INC.,
14 Defendant.

CASE NO. C10-0198JLR

ORDER DENYING PLAINTIFFS'
MOTION FOR PRELIMINARY
APPROVAL OF AMENDED
SETTLEMENT AND DENYING
INTERVENOR'S MOTION TO
LIFT STAY

15 **I. INTRODUCTION**

16 This is a putative class action against Sallie Mae (a subsidiary of SLM
17 Corporation ("SLM")) and SLM's subsidiaries and affiliates ("the Released Parties") for
18 allegedly making automated telephone calls to Plaintiffs' and putative class members'
19 cellular telephones without their prior express consent in violation of the Telephone
20 Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, *et seq.* Plaintiffs and Sallie Mae
21 ("the Parties") have reached an amended settlement agreement ("the Amended
22 Settlement"), and now move the court for an order certifying a provisional settlement

1 class, preliminarily approving the amended settlement agreement, approving the
2 proposed notice program, and scheduling a final approval hearing. (Mot. (Dkt. # 184).)
3 Intervenor Judith Harper opposes this motion (Resp. (Dkt. # 189)) and has also moved
4 the court to lift the stay that is currently in place to allow her to conduct limited discovery
5 and file a motion to certify a subclass (Stay Mot. (Dkt. # 198)). Having considered the
6 submissions of the parties, the balance of the record, and the relevant law, and having
7 heard the oral arguments of counsel on January 5, 2012, the court DENIES Plaintiffs'
8 motion for preliminary approval of the Amended Settlement (Dkt. # 184) and DENIES
9 Ms. Harper's motion to lift the stay (Dkt. # 198).

10 **II. BACKGROUND**

11 **A. Factual Background**

12 The named Plaintiffs either took out student loans with Sallie Mae or co-signed on
13 Sallie Mae student loans. (3d Am. Compl. ("Compl.") (Dkt. # 164) ¶¶ 15, 19, 23, 27.)
14 They allege that the Released Parties violated the TPCA by calling them and other Class
15 Members¹ on their cellular telephones without their prior express consent. (*See generally*
16 *id.*) The TCPA prohibits the making of calls using an automatic telephone dialing system

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18 ¹ The third amended complaint defines the class as:

19 All persons within the United States who, on or after October 27, 2005 until
20 September 14, 2010, received a non-emergency telephone call from Sallie Mae or
21 any other affiliate or subsidiary of SLM Corporation to a cellular telephone
22 through the use of an automatic telephone dialing system or an artificial or
prerecorded voice and who did not provide prior express consent for such calls
during the transaction that resulted in the debt owed.

(Compl. ¶ 44.)

1 or an artificial prerecorded voice to any telephone number assigned to a cellular
2 telephone service unless the call is made for emergency purposes or with the prior
3 express consent of the called party. 47 U.S.C. § 227(b)(1)(A). Statutory damages under
4 the TCPA are \$500 for each violation, and the court may treble this amount if it finds that
5 the violation was willful or knowing. 47 U.S.C. § 227(b)(3). Sallie Mae denies
6 Plaintiffs' allegations and claims to possess evidence that many Class Members' gave
7 their prior express consent. (Mot. at 12.)

8 **B. Procedural Background**

9 The Parties have engaged in extensive settlement negotiations and participated in a
10 handful of mediations with the Honorable Edward I. Infante (Ret.). (*See, e.g.*, Selbin
11 Decl. (Dkt. # 33) ¶¶ 11-12, 26-28; Supp. Infante Decl. (Dkt. # 186) ¶ 3.) In September
12 2010, the Parties reached a settlement ("the Original Settlement") on behalf of a class that
13 included all individuals to whom a Released Party had placed a call to a cellular
14 telephone using an automatic telephone dialing system and/or an artificial or prerecorded
15 voice. (Mot. to App. Orig. Settlement (Dkt. # 32).) The court preliminarily approved the
16 Original Settlement, provisionally certified a settlement class, and entered an order
17 staying all proceedings except those necessary to implement the terms of the Original
18 Settlement. (9/17/2010 Order (Dkt. # 39).) In December 2010, the court held a final
19 approval hearing but did not approve the Original Settlement and the motion for
20 attorneys' fees because the Parties did not give the class enough information regarding
21 the fee request or enough time to object; additionally, the notice sent to class members
22 did not identify by name all of the Released Parties. (Min. Entry (Dkt. ## 89, 103).)

1 Between January and May 2011, Sallie Mae identified approximately three million
2 additional class members. (Supp. Selbin Decl. (Dkt. # 185) ¶¶ 4, 7.) As a result, the
3 parties engaged in additional discovery and reopened settlement negotiations. (*See id.* ¶¶
4 5-6.)

5 In early 2011, Ms. Harper, who is allegedly a Charged-off Class Member,² filed a
6 motion to intervene (Dkt. # 134), which the court granted in June 2011 (June 6, 2011
7 Order (Dkt. # 154)). Ms. Harper had filed a similar putative class action in the Northern
8 District of Illinois against her loan provider, Arrow Financial, one of the Released
9 Parties. (*Id.* at 2.) The court allowed intervention because, among other reasons, the
10 Arrow Financial class members were primarily Charged-off Class Members and therefore
11 did not receive monetary relief under the Original Settlement. (*Id.* at 2-3.) After Ms.
12 Harper intervened, the court permitted Plaintiffs to amend their complaint to add Plaintiff
13 Heather McCue, who is also a Charged-off Class Member. (July 21, 2011 Order (Dkt. #
14 163).)

15 In August 2011, the Parties (and Ms. Harper) participated in a final mediation
16 before Judge Infante, and as a result, entered into the proposed Amended Settlement.
17 (Supp. Selbin Decl. ¶ 10.) Plaintiffs now move the court to preliminarily approve the
18 Amended Settlement. (*See generally* Mot.) Ms. Harper has responded, arguing that the
19 proposed settlement class does not satisfy the requirements of Federal Rule of Civil

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21 ² Charged-off Class Members are those whose “outstanding extension of credit owed to
22 or serviced by Sallie Mae or any other affiliate or subsidiary of SLM Corporation . . . has been
recognized as a loss for financial accounting purposes.” (Am. Settlement (Dkt. # 184-1) §
II(D).)

1 Procedure 23 and is not fair, adequate, or reasonable. (*See generally* Resp.) In reply,
2 Sallie Mae contends that Ms. Harper lacks standing and should be dismissed from this
3 lawsuit. (SM Reply (Dkt. # 195) at 3-6; *see also* Pl. Reply (Dkt. # 192).)

4 Shortly after Plaintiffs filed the instant motion, Ms. Harper filed a motion for class
5 certification without requesting relief from the stay that has been in place since the
6 preliminary approval of the Original Settlement (Dkt. # 191). The court struck her
7 motion with leave to re-file if and when she successfully obtained relief from the stay.
8 (11/14/2011 Order (Dkt. # 197).) As a result, Ms. Harper has filed a motion to lift the
9 stay so that she could obtain limited discovery regarding her claims against Arrow
10 Financial and re-file her motion to certify a sub-class. (*See generally* Stay Mot.)
11 Plaintiffs and Sallie Mae oppose her motion. (Pl. Resp. to Stay Mot. (Dkt. # 199); SM
12 Resp. to Stay Mot. (Dkt. # 200).)

13 **III. PROPOSED AMENDED SETTLEMENT AGREEMENT**

14 The following is a summary of the key terms of the Amended Settlement (Dkt. #
15 184-1).

16 **A. The Settlement Class**

17 The settlement class (“the Class”) is defined as:

18 [A]ll persons to whom, on or after October 27, 2005 and through
19 September 14, 2010, Sallie Mae Inc. or any other affiliate or subsidiary of
20 SLM Corporation placed a non-emergency telephone Call to a cellular
21 telephone through the use of an automated dialing system and/or an
22 artificial or prerecorded voice. Excluded from the Settlement Class are
SLM Corporation, Sallie Mae, Inc. and any other affiliate or subsidiary of
SLM Corporation, and any entities in which any such companies has a
controlling interest, the Judge to whom the Action is assigned and any

1 member of the Judge's staff and immediate family, as well as all persons
2 who validly request exclusion from the Settlement Class.

3 (Am. Settlement § II(EE).)

4 **B. Prospective Relief for Class Members**

5 All Class Members are entitled to submit a valid and timely Revocation Request,
6 which will prevent the Released Parties from using an automated dialing system and/or
7 artificial or prerecorded voice to contact them on their cellular telephones. (*Id.* §
8 III(C)(1)(a).) The Revocation Request form is one page, and Class Members will have
9 165 days from the court's approval of the Amended Settlement to submit one. (*Id.*) The
10 Revocation Request form requires Class Members to list the cellular telephone number
11 that they want the Released Parties to stop calling, their account number (if applicable),
12 and a current non-cellular telephone number, if one exists. (*Id.*) If a Revocation Request
13 is incomplete, inaccurate, and/or incorrect, the claims administrator will notify the Class
14 Member, who will have 35 days to re-submit. (*Id.*) Any Class Member who does not
15 submit a valid and timely Revocation Request will be deemed to have provided prior
16 express consent to the making of calls by the Released Parties to any phone number
17 reflected in such entities' records. (*Id.*)

18 **C. Monetary Relief for Class Members**

19 In connection with the Amended Settlement, Sallie Mae has agreed to create a
20 fund in the amount of \$24,150,000.00 ("the Fund"). (*Id.* § II(S).) The Fund will cover
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1 payments to Class Members, *Cy Pres* distributions, and all settlement costs.³ (*Id.* §
2 III(C)(2).) Monetary relief for eligible Class Members will be paid from the Fund after
3 the deduction of all settlement costs. (*Id.*)

4 For purposes of awarding monetary relief, the Class is divided into four groups:
5 (1) Delinquent Class Members, meaning those who at any time, have been 180 days or
6 more delinquent on their payments on extensions of credit owned or serviced by a
7 Released Party (*id.* § II(L)); (2) Charged-off Class Members, meaning those who have an
8 extension of credit that has been charged off (i.e. recognized as a loss) for financial
9 accounting purposes (*id.* § II(D)); (3) No Lending/Servicing Class Members, meaning
10 those who have never had a lending or servicing relationship with a Released Party,
11 except persons who were named as references on credit applications with a Released
12 Party (*id.* § III(C)(2)(f)); and (4) Regular Class Members, meaning those who are not
13 Delinquent, Charged-off, or No Lending/Servicing Class Members.

14 Regular Class Members may receive a Cash Award or a Reduction Award. (*Id.* §
15 III(C)(2)(b).) A Cash Award is a cash payment that is likely to be between \$20 and \$40.
16 (*Id.* §§ II(C), III(C)(2)(b), III(C)(2)(d).) A Reduction Award is a one-time reduction
17 from the principal balance of a Class Member's outstanding extension of credit. (*Id.* §
18 II(AA).) Delinquent Class Members who have ultimately paid the full amount owed

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20 ³ Settlement costs include: (1) attorneys' fees and costs awarded to class counsel by the
21 court; (2) incentive awards to Plaintiffs; (3) all costs of printing and providing notice to the
22 Class; (4) costs of administering the Amended Settlement (i.e. costs of printing and mailing
settlement payments or claim forms, costs of maintaining designated post office box, cost of
processing claim forms and revocation requests, etc.); and (5) fees, expenses and all other costs
of the claims administrator. (Am. Settlement § II(GG).)

1 under the terms of the relevant agreement are also entitled to a Cash Award. (*Id.* §
2 III(C)(2)(c).) All other Delinquent Class Members are only eligible for a Reduction
3 Award. (*Id.*) Charged-off Class Members and No Lending/Servicing Class Members are
4 not eligible for any monetary award. (*Id.* III(C)(2)(e)-(f).)

5 To obtain either a Cash Award or a Reduction Award, Class Members must
6 complete and submit a one-page claim form to the claims administrator within 165 days
7 of the court preliminarily approving the Amended Settlement. (*See id.* Ex. A.) If a claim
8 form is incomplete or inaccurate, the class member may re-submit a claim form within 35
9 days of the sending of a notice of defect by the claims administrator. (*Id.* III(C)(2)(h).)

10 **D. *Cy Pres* Distributions**

11 Sallie May will pay a dedicated *Cy Pres* distribution in the amount of \$85,000,
12 which will not come out of the Fund. (*Id.* §§ II(K), III(C)(2), III(C)(4).) In addition, if
13 there is any money remaining in the Fund after all other distributions are made, such
14 monies will also constitute a *Cy Pres* distribution. (*Id.* § III(C)(4).)

15 **E. Class Release**

16 The Amended Settlement provides that Plaintiffs and Class Members will release
17 the Released Parties⁴ from any and all rights, duties, obligations, claims, actions, causes
18 of action or liabilities: (1) that relate to the administration of the Amended Settlement, or
19 (2) that arise out of or are related in any way to the use of an “automated telephone
20 dialing system” and/or an “artificial or prerecorded voice” to make calls or send text

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22 ⁴ There are 39 Released Parties, including Sallie Mae, SLM, and SLM’s affiliates and subsidiaries. (Am. Settlement § II(CC).)

1 | messages to a cellular telephone used by any of the Released Parties in connection with
2 | efforts to contact or attempt to contact Class Members. (*Id.* § III(N).) This release
3 | includes claims under the TCPA, Washington’s Automatic Dialing and Announcing
4 | Device statute, or any other statutory or common law claim arising from the use of
5 | automatic telephone dialing systems and/or an artificial or prerecorded voice, which
6 | includes state and federal unfair and deceptive practices acts, state and federal debt
7 | collection practices acts, invasion of privacy, conversion, breach of contract, unjust
8 | enrichment, specific performance, and/or promissory estoppel. (*Id.*)

9 | **F. Attorneys’ Fees and Costs**

10 | Plaintiffs will move the court for an award of attorneys’ fees and expenses to be
11 | paid from the Fund in the amount of \$4,830,000, which is 20% of the amount of the
12 | Fund. (*Id.* § III(E).) Plaintiffs Arthur, Martinez, and Najafi each will request incentive
13 | awards of \$2,500. (*Id.* § III(D).) Plaintiff McCue, who is a Charged-off Class Member,
14 | will not receive any payment.

15 | **G. Class Notice**

16 | Within 30 days of the court’s approval of the Amended Settlement, the claims
17 | administrator will issue a new class notice to all Class Members. (*Id.* §§ III(F), (G).)
18 | There will be four versions of the notice, and the appropriate version will be sent to: (1)
19 | Class Members who received notice of the Original Settlement and have filed a claim
20 | form; (2) Class Members who received notice of the Original Settlement and filed only a
21 | Revocation Request; (3) Class Members who opted out of the Original Settlement; and
22 | (4) all other Class Members. (Supp. Keough Decl. (Dkt. # 187) ¶ 8.)

1 All four versions will inform Class Members of, among other things: (1) the
2 benefits that the Amended Settlement provides; (2) new extended deadlines for Class
3 Members to file a claim form and/or Revocation Request, opt out, withdraw a past
4 exclusion request, and object to the Amended Settlement and/or Plaintiffs' attorneys' fees
5 and costs request; (3) the date for the hearing on final approval; and (4) the address for
6 the settlement website. (*Id.* ¶ 4; *see also* Am. Settlement Exs. B-G.) No later than 60
7 days after the court's approval of the Amended Settlement, Class Counsel will file their
8 motion for attorneys' fees and costs and post the same on the Settlement Website. (*Id.*
9 III(H)(1).)

10 The notices will be sent via email to Class Members for whom an email address is
11 available and who have not opted out of receiving email from Sallie Mae, and via regular
12 mail to all other Class Members. (Am. Settlement §§ III(G)(2)-(3).) The claims
13 administrator will also publish notice of the Amended Settlement in two national
14 newspapers. (*Id.* § III(G)(4); *see also id.* Ex. C.) Sallie May will pay \$45,000 towards
15 the cost of this notice, in addition to the amounts it will contribute to the Fund. (*Id.* §
16 III(G)(4).)

17 IV. ANALYSIS

18 A. Ms. Harper's Standing

19 As noted above, the Parties contend that Ms. Harper lacks standing because no
20 Released Party made calls to her cellular telephone, and therefore she may not object to
21 the motion for preliminary approval. (*See generally* Pl. Reply; SM Reply) To satisfy the
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1 minimum constitutional requirements for standing under the Case or Controversy
2 requirement of Article III:

3 First, the plaintiff must have suffered an injury in fact—an invasion of a
4 legally-protected interest which is (a) concrete and particularized and (b)
5 actual or imminent, not conjectural or hypothetical. Second, there must be
6 a causal connection between the injury and the conduct complained of—the
7 injury has to be fairly traceable to the challenged action of the defendant,
8 and not the result of the independent action of some third party not before
9 the court. Third, it must be likely, as opposed to merely speculative, that
10 the injury will be redressed by a favorable decision.

11 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Friends of the*
12 *Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). “[E]ach
13 element [of standing] must be supported in the same way as any other matter on which
14 the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence
15 required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561. Thus, while
16 general factual allegations may suffice at the pleading stage, on summary judgment the
17 plaintiff must present specific facts supporting each element of the standing inquiry. *Id.*

18 The court concludes that Ms. Harper has sufficiently established standing to
19 remain in the case at this time. She has submitted a declaration stating that she received
20 numerous calls from Arrow Financial on her cellular telephone and that she did not
21 consent to these calls. (*See Harper Decl.* (attached as Ex. A to Rubel Decl. (Dkt. # 204-
22 1)).) Although Sallie Mae has submitted a declaration stating that Arrow Financial only
called Ms. Harper’s home and fax lines (Namm Decl. (Dkt. # 201) ¶ 5), and raised valid
questions regarding Ms. Harper’s credibility (Simonetti Decl. (Dkt. # 202) ¶ 13), there is
a question of fact regarding whether Ms. Harper received calls on her cellular phone.

1 Such questions of fact not appropriate for decision by the court at this time. *See Galen v.*
2 *Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007) (noting that a genuine dispute of material
3 fact precludes summary judgment); *Hall v. Glenn’s Ferry Grazing Ass’n*, No. CV-03-
4 386-S-BLW, 2006 WL 1148153, at *1 (D. Idaho Mar. 9, 2006) (holding that questions of
5 fact prevented summary judgment on issue of standing). Ms. Harper’s declaration
6 sufficiently establishes her standing to proceed with the litigation.

7 **B. Plaintiffs’ Motion to Preliminarily Approve the Amended Settlement**

8 As a matter of express public policy, federal courts strongly favor and encourage
9 settlements, particularly in class actions and other complex matters. *See Class Plaintiffs*
10 *v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the “strong judicial policy
11 that favors settlements, particularly where complex class action litigation is concerned”).
12 Nevertheless, the court must determine the propriety of class certification and review the
13 proposed Amended Settlement to assess its overall fairness. As described in more detail
14 below, although the court determines that certification of a provisional settlement class is
15 appropriate and the Amended Settlement is generally fair, the notices submitted with
16 Plaintiffs’ motion are lacking and require the court to deny the instant motion with leave
17 to file another motion for preliminary settlement approval that addresses the concerns
18 raised here.

19 **1. Propriety of Class Certification**

20 Where, as here, the parties have reached a settlement agreement prior to class
21 certification, “the court ‘must pay undiluted, even heightened, attention to class
22 certification requirements’ because, unlike in a fully litigated class action suit, the court

1 will not have future opportunities ‘to adjust the class, informed by the proceedings as
2 they unfold.’” *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 658 (E.D. Cal. 2008) (quoting
3 *Achem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). “The parties cannot ‘agree to
4 certify a class that clearly leaves any one requirement unfulfilled,’ and consequently the
5 court cannot blindly rely on the fact that the parties have stipulated that a class exists for
6 purposes of settlement.” *Id.* (quoting *Berry v. Baca*, No. 01-02069, 2005 WL 1030248,
7 at *7 (C.D. Cal. May 2, 2005)); *see also Achem*, 521 U.S. at 622 (observing that nowhere
8 does Rule 23 say that certification is proper simply because the settlement appears fair).

9 Plaintiffs seek certification under Rules 23(a) and (b)(3), and therefore must
10 satisfy the court that: (1) the class is so numerous that joinder of all members is
11 impracticable; (2) there are questions of law or fact common to the class; (3) the claims
12 or defenses of the representative parties are typical of the claims or defenses of the class;
13 (4) the representative parties will fairly and adequately protect the interests of the class;
14 (5) questions of law or fact common to class members predominate over individual
15 questions affecting only individual members; and (6) a class action is superior to other
16 available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P.
17 23(a) and (b)(3). Ms. Harper contests all elements except for numerosity, which is
18 clearly satisfied by the eight million-member class. *See* Fed. R. C. P. 23(a)(1). The
19 court, therefore, begins its discussion with commonality and concludes, for the reasons
20 discussed below, that certification of a provisional settlement class is appropriate.

1 **a. Commonality**

2 Rule 23(a)(2) requires the court to find that “there are questions of law or fact
3 common to the class.” Fed. R. Civ. P 23(a)(2). Commonality requires the plaintiff to
4 demonstrate that the class members ‘have suffered the same injury.’” *Wal-Mart Stores,*
5 *Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). It is not necessary that members of the
6 proposed class “share every fact in common or completely identical legal issues.”
7 *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010). Rather, the “existence of
8 shared legal issues with divergent factual predicates is sufficient, as is a common core of
9 salient facts coupled with disparate legal remedies within the class.” *Hanlon v. Chrysler*
10 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). “Even a single [common] question” is
11 sufficient to satisfy Rule 23(a)(2). *Dukes*, 131 S. Ct. at 2556 (internal quotation omitted,
12 alteration in *Dukes*).

13 Plaintiffs contend that commonality is satisfied “because there are many questions
14 of law and fact common to the Settlement class that center on Sallie Mae’s practice of
15 using an automated dialing system with a prerecorded voice, without regard to the
16 behavior of or individual facts related to members of the Settlement Class.” (Mot. at 34.)
17 Because commonality requires only a single common question, *Dukes*, 131 S. Ct. at
18 2556, Plaintiffs have satisfied this element. Ms. Harper nevertheless argues that the
19 Amended Settlement’s treatment of different subsets of the Class in terms of eligibility
20 for a monetary award calls into question whether there is a common nucleus of fact.
21 (Resp. at 9.) This argument is unpersuasive because a common core of salient facts is not
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1 necessary where there are shared legal issues, *see Hanlon*, 150 F.3d at 1019, and there
2 remain common questions regarding Sallie Mae's actions.

3 **b. Typicality**

4 Typicality is satisfied if “the claims or defenses of the representative parties are
5 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). It is not
6 necessary that the class representatives' injuries be identical to all class members'
7 injuries, “only that the unnamed class members have injuries similar to those of the
8 named plaintiffs and that the injuries result from the same, injurious course of conduct.”
9 *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001), *abrogated on other grounds by*
10 *Johnson v. California*, 543 U.S. 499, 504-05 (2005).

11 Plaintiffs satisfy this element because their claims arose out of the same general
12 course of events as Class Members (i.e., automated calls from the Released Parties), and
13 they will make essentially the same legal arguments as Class Members to prove their
14 claims. (Mot. at 34.) Ms. Harper nevertheless argues that typicality is not satisfied
15 because Plaintiffs Arthur, Martinez, and Najafi (“Original Lead Plaintiffs”) only intended
16 to advance the rights of Sallie Mae student loan debtors and did not negotiate on behalf of
17 any other subsidiary or on behalf of Charged-off Class Members. (Resp. at 10.) Ms.
18 Harper is correct that Plaintiffs only represent Sallie Mae borrowers, however the
19 Amended Settlement does not distinguish between Class Members based on which
20 Released Party contacted them, therefore this factor is irrelevant. Furthermore, Ms.
21 Harper ignores the fact that Plaintiff McCue is a Charged-off Class Member and fails to
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1 explain why Plaintiff McCue’s claims are not typical of those of other Charged-off Class
2 Members. Typicality is satisfied.

3 **c. Adequacy of Representation**

4 Rule 23(a)(4) requires Plaintiffs to demonstrate that they will fairly and adequately
5 protect the interests of the class. Fed. R. Civ. P. 23(a)(4). “Resolution of two questions
6 determines legal adequacy: (1) do the named plaintiffs and their counsel have any
7 conflicts of interest with other class members and (2) will the named plaintiffs and their
8 counsel prosecute the action vigorously on behalf of the class?”⁵ *Hanlon*, 150 F.3d at
9 1020.

10 *Conflicts of Interest*: “Examination of potential conflicts of interest has long been
11 an important prerequisite to class certification” and is “especially critical when a class
12 settlement is tendered along with a motion for class certification.” *Id.* The court must
13 give “heightened scrutiny to cases in which class members may have claims of different
14 strengths.” *Id.* Plaintiffs assert that their “interests are coextensive with, and not
15 antagonistic to, the interests of the Settlement Class.” (Mot. at 34.) Ms. Harper argues
16 that Original Lead Plaintiffs have a conflict of interest with Charged-off Class Members
17 because the Amended Settlement fails to award Charged-off Class Members any
18 monetary relief. (Resp. at 10.) Ms. Harper, however, ignores the fact that Plaintiff
19 McCue is a Charged-off Class Member, and asserts no reason why Plaintiff McCue

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21 ⁵ Ms. Harper argues that Plaintiffs are not adequate representatives because the Amended
22 Settlement provides unequal relief to Charged-off Class Members. (Resp. at 10-13.) This
argument is “better dealt with as part of the substantive review of the settlement than under the
Rule 23(a) inquiry,” and is therefore addressed later in this opinion. *Staton*, 327 F.3d at 958.

1 would have a conflict of interest with other Charged-off Class Members. There is no
2 apparent conflict of interest, despite the disparate relief provided in the Amended
3 Settlement.

4 *Vigorous Advocacy on Behalf of the Class:* The court’s “second adequacy inquiry
5 is directed to the vigor with which the named representatives and their counsel will
6 pursue the common claims.” *Hanlon*, 150 F.3d at 1021. “Although there are no fixed
7 standards by which ‘vigor’ can be assayed, considerations include competency of counsel
8 and, in the context of a settlement-only class, an assessment of the rational for not
9 pursuing further litigation.” *Id.* Plaintiffs assert that their counsel are qualified,
10 competent, and have extensive experience in prosecuting complex class actions. (Mot. at
11 34 (citing Dkt. ## 52-57).) In addition, Plaintiffs maintain that they have good reason for
12 not pursuing litigation further given Sallie Mae’s affirmative defenses, the risk that any
13 judgment they obtain in this case would be subject to remittitur, and the risk of protracted
14 appeals. (Mot. at 30-31.) The court agrees with Plaintiffs’ assertions and finds this
15 element satisfied.

16 **d. Predominance**

17 Predominance “tests whether proposed classes are sufficiently cohesive to warrant
18 adjudication by representation.” *Id.* at 623. “[T]he main concern in the predominance
19 inquiry . . . [is] the balance between individual and common issues.” *In re Wells Fargo*
20 *Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 956 (9th Cir. 2009). The predominance
21 requirement is “far more demanding” than Rule 23(a)(2)’s commonality requirement. *Id.*
22 at 624. To satisfy this requirement, Plaintiffs assert that “common questions present a

1 significant aspect of the case and can be resolved for all Settlement Class Members in a
2 single adjudication.” (Mot. at 34.) Although this assertion is conclusory, the court finds
3 it sufficient to establish predominance in this case, particularly given the fact that at least
4 one other court has provisionally certified a similar TCPA settlement class. *See Bellows*
5 *v. NCO Fin. Sys., Inc.*, No. 3:07-cv-01413-W-AJB, 2008 WL 4155361 (S.D. Cal. Sept. 5,
6 2008) (preliminarily certifying TCPA class for settlement purposes and finding
7 predominance satisfied). Furthermore, Ms. Harper’s undeveloped argument that
8 individual issues predominate because Charged-off Class Members do not get monetary
9 relief (Resp. at 13) is unpersuasive.

10 **e. Superiority**

11 A class action is the superior method of resolving Class Members’ TCPA claims.
12 *See Kavvu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 650 (W.D. Wash. 2007) (finding that
13 class action was superior to other methods in TCPA cases because, among other reasons,
14 individual damages are small and class members would be unlikely to litigate claims on
15 their own). Ms. Harper nevertheless argues that a class action is not the superior vehicle
16 for Charged-off Class Members’ claims because they could also bring FDCPA claims,
17 which would entitle them to an additional \$1,000 in damages. (Resp. at 14.) This
18 argument, however, does not change the fact that individual damages are small and class
19 members are unlikely to litigate claims on their own. A class action is the superior
20 method for resolving Class Members’ claims.

2. Overall Fairness of Amended Settlement

Because certification of a provisional settlement class is appropriate, the court now turns to the substance of the Amended Settlement. In determining whether to preliminarily approve a class action settlement, “the court must carefully consider ‘whether a proposed settlement is fundamentally fair, adequate, and reasonable,’ recognizing that ‘[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.’” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (quoting *Hanlon*, 150 F.3d 1at 1026); *see also* Fed. R. Civ. P. 23(e) (outlining class action settlement procedures). At the preliminary approval stage, the court “need only ‘determine whether the proposed settlement is within the range of possible approval.’” *Alberto*, 252 F.R.D. at 666 (quoting *Gatreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982)). “Essentially, the court is only concerned with whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys.” *Id.* (internal quotation and citation omitted).

The court has reviewed the Amended Settlement and determined that, as a general matter, it satisfies the Ninth Circuit’s requirement of overall fairness, *see Hanlon*, 150 F.3d at 1026; however, there are deficiencies with the proposed notices that require the court to deny the instant motion. As noted above, there are a number of class notices that will be sent to different groups of Class Members. First, the proposed notices list only 10 of the 39 Released Parties, and thus fail to fully identify who is a Class Member. It is

1 insufficient that the notices direct individuals to the Settlement Website for a more
2 detailed list of affiliates and subsidiaries. The notices must name all of the Released
3 Parties.

4 Second, some of the proposed notices improperly define the Class as including
5 individuals who received an automated call on a cellular telephone from Sallie Mae or
6 any other affiliate or subsidiary of SLM *without prior express consent*. (See Amended
7 Settlement Ex. B (“You are a Class Member if, on or after October 27, 2005 to
8 September 14, 2010, you received an automated call on a cellular telephone from Sallie
9 Mae or any other affiliate or subsidiary of SLM Corporation *without your prior express*
10 *consent.*”).) The Class is not defined in terms of prior express consent, so the phrase
11 “without your prior express consent” must be removed from the class definition in all
12 notices.

13 Finally, counsel for Ms. Harper argued for the first time at oral argument that the
14 Revocation Request form improperly requires Class Members to identify a non-cellular
15 telephone number, if available, that the Released Parties can add to their files in lieu of a
16 cellular telephone number. Ms. Harper’s counsel asserted that, under the Fair Debt
17 Collection Practices Act, consumers may request that debt collectors cease *all* telephone
18 calls, and therefore Class Members should not be required to provide a non-cellular
19 telephone number. As the parties have not briefed this issue, the court reserves ruling
20 and directs the Parties to address this issue in any future motion to preliminarily approve
21 the Amended Settlement.
22

1 Ms. Harper has also asserted a number of other reasons why the court should deny
2 Plaintiffs' motion. (*See generally* Resp.) Although the court has determined that
3 Plaintiffs' motion must be denied for the reasons stated above, it will address Ms.
4 Harper's arguments here to avoid the need for re-briefing these issues in conjunction with
5 any future motion to preliminarily approve settlement. Ultimately, the court concludes
6 that Ms. Harper has not raised any additional issue in her opposition brief that would
7 cause it to deny preliminary settlement approval.

8 Ms. Harper first argues that the Amended Settlement is inadequate because it does
9 not provide Charged-off Class Members with a Cash Award or a Reduction Award.
10 (Resp. at 10-13.) Having considered the Amended Settlement as a whole, including the
11 allocation of monetary relief, the court concludes that it is within the range of
12 reasonableness required for preliminary approval. Although "[c]ourts generally are wary
13 of settlement agreements where some class members are treated differently than others,"
14 a settlement still may be fair and adequate if there is a reasoned basis for allocating
15 monetary relief differently among different class members. *True v. Am. Honda Motor*
16 *Co.*, 749 F. Supp. 2d 1052, 1067 (C.D. Cal. 2010). Plaintiffs have explained that
17 Charged-off Class Members do not receive a monetary award because they have a
18 weaker claim to damages given Sallie Mae's affirmative defense of offset. (Pl. Reply at
19 7.) Even if Sallie Mae would not prevail with this defense, as Ms. Harper contends
20 (Resp. at 11-12), the risk created by the potential offset decreases the value of Charged-
21 off Class Members' claims. *C.f. Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068, 2007 WL
22 221862 (N.D. Cal. Jan. 26, 2007) (approving allocation of settlement proceeds where

1 | some class members received less money because there was a greater risk that they would
2 | recover nothing at trial).

3 | Further, Charged-off Class Members are entitled to prospective relief, which is the
4 | core relief provided in the Amended Settlement (Supp. Infante Decl. ¶ 5), and if they
5 | deem this insufficient, they may opt out of the Class. *See In re Mego Fin. Corp. Sec.*
6 | *Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (approving allocation of settlement proceeds in
7 | securities fraud class action, even though many class members received no relief, and
8 | noting that two practical considerations strengthened the court’s position: (1) dissatisfied
9 | class members were free to opt out, and (2) if the court decertified the class, it was
10 | possible that no one would recover anything). In the words of the Ninth Circuit, “[t]he
11 | present Settlement at least allows damages for some members of the class where damages
12 | might otherwise be unobtainable for any member of the class.” *Id.* Accordingly, the
13 | court will not deny preliminary approval because of the Amended Settlement’s allocation
14 | of monetary relief.

15 | Ms. Harper next asserts that the prospective relief provided in the Amended
16 | Settlement—the opportunity to submit a Revocation Request and stop all calls to a Class
17 | Member’s cellular telephone—is illusory because “if a class member forgets to submit a
18 | claim form, is not aware that she must submit a claim form, or otherwise fails to do so,
19 | she is automatically deemed to have granted ‘prior express consent’ as defined within the
20 | TCPA.” (Resp. at 15.) The court concludes, however, that the prospective relief is fair,
21 | adequate, and reasonable, and well within the range of possible approval. *See Alberto*,
22 | 252 F.R.D. at 666.

1 Ms. Harper next contends that the Amended Settlement creates arbitrary
2 distinctions between class members, in particular between Regular Class Members and
3 Delinquent Class Members. (Resp. at 15.) Regular Class Members and Delinquent Class
4 Members differ in their eligibility for a Cash Award or a Reduction Award, and this
5 distinction is based on each Class Member's payment history. The court is not persuaded
6 by Ms. Harper's argument and finds that there is sufficient justification for the
7 distinctions between Class Members to warrant preliminary settlement approval.

8 Finally, Ms. Harper asserts that the amount of the Fund established in the Original
9 Settlement did not increase sufficiently after Sallie Mae discovered the additional three
10 million class member. (Mot. at 16.) The court disagrees and finds that the amount of the
11 Fund is within the range of reasonableness for purposes of preliminarily approving the
12 Amended Settlement.⁶

13 In sum, the court denies the motion to preliminarily approve the Amended
14 Settlement without prejudice to re-filing in the future because the notices are improper
15 and the parties have not briefed the possible shortcoming in the Revocation Request form
16 raised by Ms. Harper's counsel at oral argument. The court does not deny the motion for
17 any of the reasons raised by Ms. Harper in her opposition brief.

18
19
20 ⁶ The Parties, however, should keep in mind that at any final fairness hearing, the court
21 will have to compare the settlement amount to the Parties' "estimates of the maximum amount of
22 damages recoverable in a successful litigation." *See In re Mego Fin. Corp. Securities Litig.*, 312
F.3d 454, 459 (9th Cir. 2000). The Parties did not submit their estimates in support of the instant
motion, but should include this information in any future motion for preliminary approval.

1 **C. Ms. Harper's Motion to Lift the Stay**

2 When the court preliminarily approved the Original Settlement in September
3 2010, the court stayed all proceedings in and related to this matter except for those to
4 effectuate the settlement. (*See* 9/17/2010 Order.) Ms. Harper now moves the court to lift
5 the stay so that she can issue limited discovery and file a motion to certify a sub-class.
6 (*See generally* Stay Mot.) For the reasons explained below, the court denies Ms.
7 Harper's motion.

8 A district court may exercise its discretion "to control the disposition of the causes
9 on its docket in a manner which will promote economy of time and effort for itself, for
10 counsel, and for litigants." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); *see*
11 *also Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109-13 (9th Cir. 2005). "Where it is
12 proposed that a pending proceeding be stayed, the competing interests which will be
13 affected by the granting or refusal to grant a stay must be weighed." *CMAX*, 300 F.2d at
14 268. The court may consider: (1) the possible damage which may result from the
15 granting of a stay, (2) the hardship or inequity which a party may suffer in being required
16 to go forward, and (3) the orderly course of justice measured in terms of the simplifying
17 or complicating of issues, proof, and questions of law which could be expected to result
18 from a stay. *Id.* (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)).

19 Ms. Harper argues (1) the advanced stage of the case weighs in favor of
20 overturning the stay, (2) maintaining the stay will prejudice her because she will not be
21 able to pursue her claims, and (3) the stay is complicating, rather than simplifying, issues.
22 (Stay Mot. at 5.) Plaintiffs respond that maintaining the stay will not prejudice Ms.

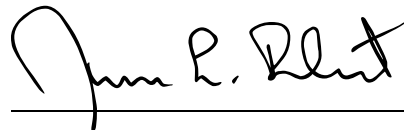
1 Harper but lifting it will prejudice them because it will delay their receipt of relief under
2 the Amended Settlement and force them to expend time and effort responding to a
3 baseless class certification motion. (Pl. Resp. to Stay Mot. at 4-7.)

4 After considering these competing interests, the court declines to lift the stay.
5 Although the court currently is denying Plaintiffs' motion for preliminary settlement
6 approval, it is likely that Plaintiffs will be able to remedy the shortcomings identified in
7 this order and obtain preliminary approval in the near future. Maintaining the stay,
8 therefore, will facilitate settlement. Further, Ms. Harper will not be damaged from
9 maintaining the stay because she may opt out of the Amended Settlement and fully
10 pursue her claims individually against Arrow Financial.

11 **V. CONCLUSION**

12 For the reasons set forth herein, the court DENIES Plaintiffs' motion for
13 preliminary settlement approval (Dkt. # 184), and DENIES Ms. Harper's motion to lift
14 the stay (Dkt. # 198). Plaintiffs may submit a revised motion for preliminary settlement
15 approval that addresses the concerns raised in this order.

16 Dated this 10th day of January, 2012.

17
18 

19 JAMES L. ROBART
20 United States District Judge
21
22